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Supreme Court, U.S.
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No. 96-145

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

UNITED STATES ex rel. PAUL,
Petitioner,

v.

PARSONS, BRINKERHOFF,
QUADE & DOUGLAS, INC. et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT BATTELLE MEMORIAL INSTITUTE, PROJECT MANAGEMENT DIVISION

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QUESTION PRESENTED

I. Whether the district court abused its discretion in denying the Petitioner's motion, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, for relief from that court's earlier order dismissing Petitioner's False Claims Act ("FCA") complaint, brought pursuant to 31 U.S.C. § 3730(b) (1994), on the basis that Petitioner's action was barred by res judicata, where Petitioner failed to satisfy the requirements of Rule 60(b), warranting relief from the dismissal of this action.

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JURISDICTION

A final decision was issued by the United States District Court for the Southern District of Texas on August 9, 1995 and that decision was affirmed by the United States Court of Appeals for the Fifth Circuit on April 26, 1996. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., Civil Action Number H-92-2429 (S.D. Tex. August 9, 1995), aff'd without op., 85 F.3d 624 (5th Cir. 1996). Petitioner filed the instant Petition for Writ of Certiorari ("Pet.") within ninety days of that denial. Accordingly, the Petition was timely filed under Rule 13.1 of the Supreme Court Rules. See 28 U.S.C. § 1254.

Although this Court has jurisdiction to review this case under Rule 13.1 and 28 U.S.C. § 1254, Respondent Battelle Memorial Institute ("BMI") continues to assert -- as it did before the district court and the Fifth Circuit -- that the federal courts lack subject matter jurisdiction over this case. Briefly, under the FCA, the federal courts lack jurisdiction over any cause of action arising prior to 1986 if the "action is based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982), amended by 31 U.S.C. § 3730(e)(4) (1994). For claims arising after 1986, the courts have no jurisdiction over actions based upon publicly disclosed allegations or transactions unless the relator is the "original source" of that information. 31 U.S.C. § 3730(e)(4) (1994). As BMI asserted before the lower courts, Petitioner's FCA suit contains no information that the Government did not have when the action was brought, all of Petitioner's allegations had been publicly disclosed when the action was brought and Petitioner is not an "original source." Consequently,

there is no federal court subject matter jurisdiction over this action.

PROCEDURAL HISTORY

BMI is a non-profit charitable trust organized as a non-profit corporation under the laws of the State of Ohio.[1/] Its primary activity is the performance of research, development, management, and technical services on a contract basis for industrial, federal, state, and local governmental clients. Petitioner Paul is an engineer who, in 1982, worked for Respondent PB-KBB, one of two companies constituting a joint venture that was a subcontractor to BMI. The joint venturers were Respondents PBQD, a New York corporation, and PB-KBB, a Delaware corporation.

On August 10, 1992, Paul filed a complaint in the United States District Court for the Southern District of Texas under the qui tam provisions of the FCA, 31 U.S.C. § 3730(b) (1994), against PB-KBB and PBQD. On September 11, 1992, Paul filed a qui tam complaint against BMI containing virtually identical allegations. On April 1, 1993, pursuant to 31 U.S.C. § 3730(b)(4)(B), the United States filed a Notice of Election Not to Intervene in this action. On July 14, 1993, the district court ordered the consolidation of

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1/ In addition to BMI, a listing of the parties in the lower court proceedings, as required by Rule 14.1(b) of the Supreme Court Rules, includes: (1) Petitioner Dilip Kumar Paul ("Paul"); (2) Respondent P.B.-K.B.B., Inc. ("PB-KBB"); and (3) Respondent Parsons, Brinkerhoff, Quade & Douglas, Inc. ("PBQD"). Pursuant to Rule 29.1 of the Supreme Court Rules, BMI states that it has no parent companies, however, it has two non-wholly owned subsidiaries: (1) Geosafe Corporation; and (2) Research Insurance Company Limited. Both of these subsidiaries are approximately 99% owned by BMI.

Paul's complaint against PBQD and PB-KBB with the action against BMI. The district court subsequently granted BMI's motion to dismiss. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 310, 372 (S.D. Tex. 1994).

On August 30, 1994, Paul filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. On April 28, 1995, the Fifth Circuit affirmed the district court ruling. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 53 F.3d 1282 (5th Cir. 1995) (unpublished opinion).

Thereafter, Paul filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure, in the district court, on July 17, 1995, seeking relief from the Court's earlier order dismissing Paul's qui tam suit on the basis that Paul's action was barred by res judicata. Primarily, Paul argued that, based upon purported newly discovered evidence, the prior state-court judgment was void, and, thus, could not be the basis for the district court's finding of res judicata. Among numerous contentions, Paul asserted that the prior state-court judgment was not a "final judgment on the merits" because: (1) the Texas state court lacked subject matter jurisdiction and in personam jurisdiction over certain purportedly "indispensable parties" (even though Paul was the party that filed that action in Texas and failed to join those "indispensable parties); and (2) according to Paul, PB-KBB fraudulently obtained the prior state-court judgment. In addition, Paul attempted to re-argue that: (1) there is no privity between PBQD and PB-KBB, permitting the application of res judicata; (2) there could be no res judicata because his FCA claim could not have been brought in the Texas state court; and (3) the state-court action and the instant case did not arise "from the same nucleus of operative facts." Without

elaboration, the district court on August 9, 1995 summarily denied Paul's Rule 60(b) motion. Paul, Civil Action Number H-92-2429 (S.D. Tex. August 9, 1995).

On September 6, 1995, Paul filed a Notice of Appeal, in the United States Court of Appeals for the Fifth Circuit, attempting to reargue many of the matters previously addressed by the Fifth Circuit. Specifically, he argued that: (1) jurisdiction over the FCA suit lies solely in the federal court and, therefore, he could not have included his FCA claims in his prior state-court action; (2) the prior state-court judgment was not a "final judgment on the merits" because: (a) the Texas state court lacked subject matter jurisdiction and in personam jurisdiction over purportedly "indispensable parties," and (b) according to Paul, PB-KBB fraudulently obtained the prior-state-court judgment; (3) it was inappropriate for the district court to rely upon Texas state law when assessing the res judicata impact of the prior state-court ruling; (4) the FCA claims and the prior state-court action did not constitute the same cause of action; and 5) the res judicata bar is inappropriate because PBQD, BMI and the United States were not parties to the state-court action. Paul further argued that a United States Magistrate Judge was without authority to rule, without Paul's consent, on his motion to compel production of documents, and the case should not have been dismissed without permitting him to engage in discovery.

While the appeal of the district court's denial of this motion under Rule 60(b) of the Federal Rules of Civil Procedure was pending, Paul filed, on December 12, 1995, a Petition for Writ of Certiorari in the United States Supreme Court. In that Petition, Paul sought review of the district court's decision dismissing his

case, Paul, 860 F. Supp. 370, aff'd without op., 53 F.3d 1282 (5th Cir. 1995). On January 22, 1996, the Court denied Paul's Petition. United States, ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 116 S.Ct. 817 (1996).

Subsequently, on April 26, 1996, the Fifth Circuit issued its opinion affirming the district court's denial of the motion under Rule 60(b) of the Federal Rules of Civil Procedure. United States, ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 85 F.3d 624 (5th Cir. 1996). The Fifth Circuit, in an unpublished opinion, found: (1) that Paul had failed to show that the district court abused its discretion in denying his motion to dismiss under Rule 60(b)(3) because of fraud, misrepresentation, or other misconduct of an adverse party; (2) the absence of purportedly "indispensable parties" in the Texas state court trial does not create a jurisdictional defect and does not provide a basis for collaterally challenging the state court's judgment; (3) that Paul's argument that the Texas state courts were without jurisdiction to resolve legal issues involving claims that arose in other jurisdictions was without merit, because the fact that a claim arose in another jurisdiction, and may have impacted that jurisdiction more directly, is not determinative of the court's authority to render a judgment; (4) that Paul had abandoned the issue of the state court's personal jurisdiction over contracts negotiated and executed in Ohio by failing to brief this issue on appeal; and
(5) that Paul's argument, that claims against individuals who were not named in the state court suit may not be barred by the doctrine of res judicata, is without merit as the court had previously found that there was privity among all of the defendants and that the claims against them were barred. Paul v. Parsons, Brinkerhoff, Quade, & Douglas, No. 95-20733, slip op.

(5th Cir. April 26, 1996). The Fifth Circuit further admonished Paul that:

> any additional frivolous appeals filed by him will invite imposition of sanctions, Paul is further cautioned to review any pending appeals to ensure that they are not frivolous because they have been previously decided by this court.

Id. Paul's second appeal was accordingly dismissed and a sanctions warning issued.

Despite the Fifth Circuit's clear warning that "his appeal is frivolous and is dismissed" Paul has again filed the instant Petition for Writ of Certiorari in this Court, raising substantially the same issues raised in his prior Petition for Writ of Certiorari, that was decided on January 22, 1996. The only difference between the two petitions is that the standard of review, if the second petition were granted, would be whether the district court abused its discretion in refusing to reconsider the rulings left standing by this Court's denial of the first Petition. Such an issue can hardly merit the Court's intervention. As there are no conflicting court decisions with the instant case and there are no important questions of federal law to be decided, settled, or that are in conflict with relevant decisions of this Court, Paul's Petition should be denied. See Rule 10 of the Supreme Court Rules.

BACKGROUND FACTS

A. Contract History

From 1965 to the present, BMI has provided research and development services to the U.S. Department of Energy ("DOE") as the contractor

operating the Pacific Northwest Laboratories located in Richland, Washington. On April 28, 1978, BMI was assigned responsibility for the management of DOE's National Waste Terminal Storage Program. In particular, BMI was directed to and did establish a new Project Management Division responsible for (1) identification of potential sites with salt formations and/or other geological formations within the United States suitable for development for potential nuclear waste repositories, and (2) the coordination and direction of the development of criteria and specific technologies required for exploration, design, licensing, construction, operations, and monitoring of these repositories.

Effective June 14, 1982, BMI and a joint venture (comprised of PBQD and PB-KBB) known as Parsons Brinkerhoff/P.B.-K.B.B. ("PB/PB-KBB") entered into a subcontract, pursuant to which PB/PB-KBB was to provide architectural and engineering design services relating to the construction of exploratory shafts that would be used to investigate the geological features of potential nuclear waste disposal sites in salt formations (the "Subcontract"). On October 7, 1982, DOE approved the Subcontract.

B. Litigation History

Paul was hired by PB-KBB in May 1981. In June 1982, he was assigned to work on the Exploratory Shaft Facility design, the project encompassed by the Subcontract. Paul alleges that he soon concluded the preliminary design specifications were inconsistent with requirements under federal mine safety standards. Paul claims that he informed his supervisors, orally and in writing, of his concerns. According to Paul, these acts resulted in his transfer to another division at PB-KBB and, ultimately -- twelve days after drafting

a memorandum summarizing his concerns -- to his discharge.

In 1983, Paul brought a Title VII action in the United States District Court for the Southern District of Texas against PB-KBB, Civil Action No. H-83-3409, alleging that he was discharged on the basis of his national origin. That action was dismissed without prejudice by stipulation of the parties on June 7, 1984. Paul then filed an action under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 801 et seq. (1994), with the Secretary of Labor, wherein he argued that, in violation of § 815(c)(1) of the Mine Act, he was fired because of his safety complaints. Paul v. P.B.-K.B.B., Inc., 3 MSHC 2006, 2007 (1985). The Secretary of Labor rejected Paul's claim. Id. Paul appealed the Secretary's decision to the Federal Mine Safety and Health Review Commission ("the Commission"). Id. at 2008. The Commission, however, upheld the Secretary's decision. Id. Paul then appealed the Commission's ruling to the United States Court of Appeals for the District of Columbia Circuit, which upheld the Secretary. Paul v. Federal Mine Safety and Health Review Comm'n, 812 F.2d 717, 718 & 720 (D.C. Cir.), cert. denied, 483 U.S. 1023 (1987).

Undeterred, Paul then brought an action in Texas state court, alleging that he was wrongfully discharged for his unwillingness to commit a criminal act. Paul v. P.B.-K.B.B., Inc., 801 S.W.2d 229 (Tex. App. -- Houston [14th Dist.] 1990, writ denied). In that action, Paul contended that "the preliminary study [prepared by PB-KBB] called for one shaft rather than two and that this design 'could've killed people.'" Id. at 229. Paul argued that, as the engineer, he would be called upon to certify the plans and specifications, and doing so would be a violation of § 22.05 of the Texas

Penal Code which proscribes "reckless conduct." Id. According to Paul, it was these objections to the project, that resulted in his termination. Id. at 230. After trial, the jury found that Paul was not fired solely because he refused to commit an illegal act. On appeal, the verdict was affirmed. Id. at 230.

Paul attempted to dress up his losing state-court action in new federal clothing by filing a complaint in the United States District Court for the Southern District of Texas. However, as the same operative facts underlay both actions, the district court dismissed his federal action based on res judicata. This ruling was affirmed by the Fifth Circuit and Paul's Petition for Writ of Certiorari denied by this Court. Paul, 860 F. Supp. 370 (S.D. Tex. 1994), aff'd without op., 53 F.3d 1282, cert. denied, 116 U.S. 817 (1996).

Paul thereafter filed, in the district court, his motion for reconsideration of the order dismissing his federal complaint, pursuant to Federal Rule of Civil Procedure 60(b). This motion was denied by the district court and affirmed by the Fifth Circuit. Paul, H-92-2429 (S.D. Tex. August 9, 1995), aff'd without op., 85 F.3d 624 (5th Cir. 1996). Paul then filed the instant Petition for Certiorari seeking review of the district court's denial of his motion for reconsideration and the Fifth Circuit's review of that decision.

SUMMARY OF ARGUMENT

Paul's petition, although presented in five separate questions, may only raise one issue in this Court: whether the district court abused its discretion in denying Paul's motion, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, for relief from that court's earlier order dismissing Paul's qui tam suit on the basis that Paul's action was barred by res judicata,

where Paul failed to satisfy any of the elements under Rule 60(b) warranting such relief, but instead offered only conclusory allegations of purported fraud and of jurisdictional defects in the prior state-court action.

ARGUMENT

I. The District Court Correctly Denied Paul's Motion to Dismiss Under Rule 60(b) of the Federal Rules of Civil Procedure

A. Standard of Review

Rule 60(b) of the Federal Rules of Civil Procedure provides, in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other

> reason justifying relief from the operation of the judgment . . . .

The review of a district court's denial of a Rule 60(b) motion is extremely limited. See Wilson v. Thompson, 638 F. 2d 801, 803 (5th Cir. Unit B Mar. 1981) ("the determination of the district court is subject to review only for an abuse of discretion"); see also Travelers Ins. Co. v. Liljeberg Enters., Inc., 38 F.3d 1404, 1408 (5th Cir. 1994) ("[i]t is not enough that the granting of relief might have been permissible, or even warranted -- denial must have been so unwarranted as to constitute an abuse of discretion.") (citation omitted). Appellate review of the denial of a Rule 60(b) motion, is further limited to whether the district court abused its discretion in denying the motion for reconsideration, but not the underlying judgment. See Browder v. Director Ill. Dept. of Corrections, 434 U.S. 257, 263 n.7 (1988) ("The Court of Appeals may review the ruling only for abuse of discretion, however, and an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.")

B. Jurisdiction Of The State Court

Paul sets forth five questions in his Petition. In questions two, three, and four, Paul attacks the validity of the state court judgment by arguing that the state court did not have jurisdiction over the action. Specifically, in question two of the Petition, Paul argues that the absence of "indispensable" parties in the Texas state court case creates a jurisdictional defect thereby rendering that judgment void. In question three, Paul contends that the Fifth Circuit erred in finding that Paul had abandoned his contention that the state court lacked in personam jurisdiction because the contracts at issue in the case were negotiated and

executed in Ohio, for work performed in Utah, Louisiana, Texas, and Mississippi. In question four, Paul challenges the Fifth Circuit's finding that the state court had jurisdiction over legal issues involving claims that arose in other jurisdictions.

1. The Alleged Absence Of Indispensable Parties In The State Court Case Does Not Impact The Validity Of The Texas Judgment

Paul contends that the state court judgment was void because "indispensable" parties were not joined. Although his allegations are unclear, Paul appears to argue that PB-KBB, in the prior state-court action, concealed the fact that Paul was replaced on the project by two Canadians. Because these "Canadians" were "indispensable" parties in the state-court action, their absence renders the state-court action void for lack of subject matter jurisdiction and lack of in personam jurisdiction over the Canadians. He also claims that PB-KBB committed fraud in the prior state-court action because PB-KBB stated that Paul's employment was terminated due to a "lack of work," after assigning his job functions to the Canadians. See Pet. at 17. According to Paul, PB-KBB could not have committed this "fraud and perjuries [sic]" in the state court if the Canadians were joined as parties. Id.

Even if Paul had, in fact, presented newly discovered evidence to the district court that: (1) he was replaced by "two Canadians" and (2) PB-KBB's explanation for Paul's termination in the state-court action was false, and he demonstrated that he exercised due diligence in discovering the evidence, such "facts" are not material and do nothing to change the outcome in this case. See, e.g., Washington v. Patlis, 916 F.2d 1036, 1038 (5th Cir. 1990) (noting that

Rule 60(b) movant must show that the new evidence would likely produce a different trial result). That is, even if Paul had been replaced by "two Canadians," that fact would do nothing to remove the jurisdiction of the state court in the prior action. Further, even if PB-KBB had presented a false explanation in the prior state-court action as to why Paul was terminated, the state-court judgment would still be valid for purposes of res judicata.

Paul's argument that the absence of indispensable parties defeated the state court's jurisdiction over his case is also without merit. The state-court action was brought by Paul in a court of general jurisdiction in Harris County, Texas. See Tex. Gov't Code Ann. § 24.007 ("Jurisdiction") (Vernon 1988). That action concerned whether, under Texas state law, Paul had been wrongfully terminated from his employment in PB-KBB's Houston, Texas office. Paul, 801 S.W.2d at 229. Paul, as the plaintiff in that case, chose the forum and elected to bring the action in Texas state court. Clearly, there would have been no basis upon which Paul could have attacked the state court's subject matter jurisdiction over his state law claim before the district court in the instant action. See generally Restatement (Second) of Judgments § 12 (1982) (noting that parties are precluded from litigating a "court's subject matter jurisdiction in subsequent litigation [unless] [t]he subject matter jurisdiction of the action is so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority"). The district court, therefore, did not abuse its discretion in rejecting this meritless argument.

Still, in his Rule 60(b) motion, Paul presented an assertion that somehow the Texas state court lacked in personam jurisdiction over "an essential party, the

Canadians," who "conspir[ed] to have [] Paul fired," and, thus, the state-court judgment was invalid. Paul makes the same assertion in his Petition. See Pet. at 16. Although the true nature of Paul's contention is difficult to ascertain, apparently Paul believes that after he was terminated, his job functions were transferred to two Canadians "illegally working" in the United States, and the "Texas state court[] lack[ed] in personam jurisdictions [sic] over these foreign citizens, who are indispensable parties." Paul believes that these Canadian employees were "indispensable part[ies]," and the Texas state court's judgment was void "due to the . . . lack of in personam jurisdiction over [the] Canadian domiciles." Yet, Paul never named these purported "indispensable parties" as defendants in the state-court action, and Paul participated fully in that action, without raising the issue of joinder of additional parties.

Moreover, even accepting Paul's groundless claims that his job functions were transferred to two Canadians and that he was "unaware" of this "fact," Paul has presented no facts to suggest that indispensable parties were lacking in the prior Texas state-court action. Rule 39 of the Texas Rules of Civil Procedure, which parallels Rule 19 of the Federal Rules of Civil Procedure, addresses the joinder of indispensable parties. Tex. R. Civ. P. 39 (West 1995); see also Fed. R. Civ. P. 19. Essentially, the purpose of the federal and state joinder rules is to ensure that the interests of all parties to litigation are protected. See generally Schutten v. Shell Oil Co., 421 F.2d 869, 873 (5th Cir. 1970); Vondy v. Commissioners Court of Uvalde County, 620 S.W.2d 104, 106-07 (Tex. 1981). For example, the right of a defendant not to be subjected to multiple litigation and potential inconsistent obligations are central concerns under these rules. Id.; Schutten, 421 F.2d at 873. Paul has

presented no facts that "the Canadians" had any interest in the state-court action such that they should have been joined as parties, and he has not explained how "the Canadians" could have been liable to Paul under the applicable state law in that case. Further, Paul fails to explain how his rights could not be fully litigated in the prior state-court action or how there was any possibility of inconsistent judgments. Paul's purported newly discovered evidence, therefore, would do nothing to alter the outcome from the district court's dismissal of the action. Consequently, the district court did not abuse its discretion in denying Paul's Rule 60(b) motion. See Paul, 95-20733, slip op. (5th Cir. April 26, 1996) (noting that in his Appellate Brief, Paul failed to explain: why the interests of these absent parties were negatively affected because they were not joined as defendants in the state court action; how the absent parties would have been liable to him under the state law; and why the absence of these parties created a jurisdictional defect).

2. Paul Has Effectively Abandoned His Contention That The State Court Lacked Jurisdiction Over Contracts Negotiated In Other States By Failing To Brief It On Appeal To The Fifth Circuit

In Question Three, Paul appears to be arguing that the state court lacked jurisdiction over the original action because the contracts at issue were negotiated in other states. The Fifth Circuit found that Paul had abandoned this issue by failing to brief it on appeal. Paul, 95-20733, slip op. (5th Cir. April 26, 1996) (citing to Brinkman v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987)). In his Petition, Paul strenuously objects to this finding, pointing out the various places that he supposedly raised the issue.

See Pet. at 20-24. However, Paul points to various pleadings in the *district court* where he purportedly raised the lack of the state court's jurisdiction over contracts negotiated and executed in other states. Apparently, Paul misunderstands the principle that an issue not raised on appeal is "effectively abandoned." See Al-Ra'Id v. Ingle, 69 F.3d 28, 33 (5th Cir. 1995). Accordingly, Paul's detailed descriptions of where he argued this issue in the district court are irrelevant.

Paul also argues that he did brief this issue in his appeal to the Fifth Circuit of the district court's denial of this motion under Rule 60(b), and cites to various places in his Fifth Circuit Appellate Brief in which he allegedly raised this issue: (1) in the Statement of the Case; (2) in Issue Number Three of his Appellate Brief; and (3) in Issue Number Five of his Appellate Brief. Contrary to Paul's contention that he briefed the issue of the state court's jurisdiction over contracts negotiated and executed in other states, the citations to which he directs this Court relate to other, miscellaneous issues but do not address his jurisdictional argument. Accordingly, Paul may not seek redress in this Court of this particular issue.

3. Paul's Argument That The State Court Did Not Have Jurisdiction Over Claims That Arose In Other Jurisdictions Does Not Impact The Validity Of That Judgment

In Question Four, Paul appears to argue that the state court did not have jurisdiction over claims that arose in other jurisdictions. As the Fifth Circuit noted:

> Paul's argument goes to the subject-matter jurisdiction of the state court to

> adjudicate claims arising in other jurisdictions. While the place where the alleged tort occurred may be pertinent to personal jurisdiction, venue, or the question of which forum's law should be applied, the fact that a claim arose in another jurisdiction and may have impacted that jurisdiction more directly is not determinative of the court's authority to render a judgment.

Paul, 95-20733, slip op. (5th Cir. April 26, 1996). Paul's argument that the state court did not have subject matter jurisdiction over certain of his claims is without merit. Accordingly, the district court did not err in refusing to grant his motion to reconsider on the basis that the state court judgment is void for lack of subject matter jurisdiction.

C. Paul Improperly Raises The District Court's Underlying Decision Which Is Not Reviewable In The Instant Appeal

In question five of the Petition, Paul appears to be arguing that the district court erred in finding that his federal action was barred by res judicata. The district court's ruling based on res judicata has been affirmed by the Fifth Circuit and Paul's previous Petition for Writ of Certiorari in this Court denied. See Paul, 860 F. Supp. 370 (S.D. Tex. 1994), aff'd 53 F.3d 1282 (5th Cir. 1995), cert. denied, 116 S.Ct. 817 (1996). Therefore, he cannot raise this issue yet again in the these proceedings. Rather, the scope of review in these proceedings is limited to determining whether the district court erred in denying Paul's motion to dismiss under Rule 60(b) of the Federal Rules of Civil Procedure. It is not to reargue whether the underlying district court decision, dismissing the case based on res

judicata was correct. See Gulf Coast Bldg. and Supply Co. v. International Brotherhood of Electrical Workers, 460 F.2d 105, 1107 (5th Cir. 1972) (where a matter has been affirmed on appeal, "whatever was before the appellate court and disposed of by the decree is considered as finally settled and becomes the law of the case.").

D. **The District Court Did Not Abuse Its Discretion In Denying Paul's Rule 60(b)(3) Motion, Because, Even Assuming That Paul Could Establish That The Defense Of His State Case Was Predicated Upon Factually False Evidence, Paul Has Failed To Demonstrate that He Was Prevented From Fully And Fairly Presenting His State Court Case**

In question one of the Petition, Paul contends that the district court erred in denying the motion for reconsideration based on fraud committed during the Texas state proceedings, which he only discovered when he filed the instant lawsuit. See Pet. at 14. Specifically, Paul argues that during the state court trial, attorneys' representing PB-KBB, presented evidence by "perjuring, denying, contradicting and disputing their prior testimonies to the Federal Mine Safety Review Commission's proceedings . . . ." Id. According to Paul, as the trial proceeded on an unscheduled date, Paul was unable to attend the trial to "challenge" the "fraudulent and perjurious testimonies [sic] presented by PB-KBB in front of the Jury." Id. Further, according to the Petition, testimony presented by PB-KBB was inadmissible under Texas Rules of Evidence and Texas Rules of Civil Procedure, rendering the state court judgment void.

Even assuming arguendo that a judgment was obtained by fraud, that judgment is still res judicata in a subsequent action, provided the prior court had jurisdiction to render the judgment. See Vandervoort, Sams, Anderson, Alper & Post, P.A. v. Vandervoort, 529 F.2d 424, 426 (5th Cir. 1976) (noting that a "collateral attack on a judgment" based upon fraud is "irrelevant" once "it [has been] determined that the court had jurisdiction"); Midessa Television Co. v. Motion Pictures for Television, Inc., 290 F.2d 203, 205 (5th Cir.), cert. denied, 368 U.S. 827 (1961); see also Slangal v. Getzin, 148 F.R.D. 691, 694 (D. Neb. 1993) ("Generally, a judgment of a court may not be collaterally attacked . . . unless the court was without jurisdiction to reach that decision."); see generally 21 Federal Procedure, L. Ed. § 51:188 (1984) ("As a general rule, even if a judgment that was obtained by fraud it is res judicata so long as the court rendering it had jurisdiction to do so.")

The only exception to the above stated general rule is that a collateral attack may be permitted on a prior judgment if the attack is based upon "extrinsic," rather than "intrinsic," fraud. Fidelity Standard Life Ins. Co. v. First Nat'l Bank & Trust Co., 382 F. Supp. 956, 963 (S.D. Ga. 1974) ("[T]he impeachment of a foreign judgment is limited to existence of fraud that is extrinsic in nature . . . ."), aff'd, 510 F.2d 272 (5th Cir.), cert. denied, 423 U.S. 864 (1975); Gilbert v. Franklin County Water Dist., 520 S.W.2d 527, 533 (Tex. Civ. App. -- Texarkana 1975, no writ) ("Neither a collateral nor direct attack upon a prior judgment can be based upon intrinsic fraud.") see also Slangal, 148 F.R.D. at 694. "'[I]ntrinsic fraud' [includes] false testimony, fraudulent instruments, and any fraudulent matter that was presented and considered in rendering a judgment." Raney v. Mack, 504 S.W.2d 527, 533 (Tex. Civ. App. -- Texarkana 1973, no writ). By

comparison, "fraud that is extrinsic in its nature, [prevents] one from having a real contest of the suit based on conduct or activities outside of the court proceedings themselves." Fidelity Standard Life Ins. Co., 382 F. Supp. at 963. Such "extrinsic" fraud "must be collateral to the matter tried, and not something which was actually or potentially in issue in the trial." Raney, 504 S.W.2d at 533; see generally Restatement (Second) of Judgments § 70, Comment b. (1982).

In the instant case, the fraud that Paul claims occurred in the state-court action consists solely of allegations of "intrinsic" fraud. Paul's argument is that in the state-court proceeding, PB-KBB put forth "fraudulent [and] perjurious" explanations as to why Paul had been dismissed. See Pet. at 13-14. Yet, the reason for Paul's termination was the exact issue that was before the state court. Paul, 801 S.W.2d at 229. Where the purported fraud "relates to the material issues in the [] case," then the attack on the prior judgment solely involves "intrinsic" fraud and cannot be the basis for a collateral attack. Gilbert, 520 S.W.2d at 505-06. Because the alleged fraud relates solely to the issue pending before the state court, accepting Paul's allegations as true, the outcome of the district court's order would have been no different. As the Fifth Circuit noted:

> [e]ven if it its assumed that Paul can establish by clear and convincing evidence that the defense was predicated upon factually false testimony, Paul has failed to demonstrate that he was prevented from fully and fairly presenting his state court case. Therefore, Paul has failed to show that the district court abused its discretion in denying his motion under Rule 60(b)(3) because of

'fraud, misrepresentation, or other misconduct of an adverse party.

Paul, No. 95-20733, slip. op. (5th Cir. April 26, 1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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